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No. 83-1887

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1983

STRATFORD PLACE CORP. and SOLIL MANAGEMENT CORP.,

Petitioners,

-against-

JAMES CAPALINO, or his successor in office, as Commissioner of General Services of the City of New York, and EDWARD I. KOCH, HARRISON J. GOLDIN, CAROL BELLAMY, ANDREW S. STEIN, STANLEY SIMON, HOWARD GOLDEN, DONALD MANES, and ANTHONY R. GOETA, or their successors in office, constituting the members of the Board of Estimate of the City of New York, and the CITY OF NEW YORK,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

Whether the District Court properly dismissed and the Court of Appeals properly affirmed the dismissal of the complaint as precluded under principles of res judicata by judgments entered and affirmed in the State court?

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STATEMENT OF THE CASE

(1)

Petitioner corporations are the former owners of separate, adjoining parcels of improved real

estate, 15-23 William Street and 44 Beaver Street, Manhattan (2a, 3a, 4a, 29a).* Mr. Sol Goldman is president of each corporation (29a, 6a; Deft's Exh. L, p. 20). In 1977, New York City commenced in rem foreclosure proceedings pursuant to its Administrative Code, Chapter 7, Title D against each parcel since real estate taxes and water and sewer charges had gone unpaid with respect to each parcel for more than three years. As to plaintiff Stratford, the arrears amounted to approximately $1,700,000 (74a), while as to plaintiff Solil the amount was about $1,050,000 (Deft's Exh. L. p. 14). New York City acquired title to each property on May 24, 1978 (64a).

N.Y.C. Administrative Code, section D17-25.0 permits former owners of real property taken in an in rem tax foreclosure proceeding to reacquire the parcel taken by filing an application for a release of

*Parenthetical references with suffix "a" are to Joint Appendix in Court of Appeals, Second Circuit, unless otherwise indicated.

the City's interest in the property. If the application is made within four months after the date of the City's acquisition of the property and the Corporation Counsel approves the former owner's application as to form, timeliness and eligibility, and the applicant pays all amounts required to be paid within sixty days of the date on which a letter requesting such payment is mailed to the applicant, then the City must restore title to the former owner. Within this four-month period, referred to as a "mandatory period," the City may not sell or assign the property to any party or agency. The statute states further, at §D17-25.0(g), that if an application is filed after the four-month "mandatory period" but within two years from the date on which the City's deed to the parcel was recorded, (which would be an additional twenty months after the four-month mandatory period expires) then the Board of Estimate of the City of New York may, in its discretion, authorize the release of the City's interest in the parcel. The twenty-months period of time which runs after the four-month "mandatory

period" expires is referred to as a "discretionary period." If the Board of Estimate, in its discretion, authorizes the release of the City's interest in the property, the former owner has sixty days from the receipt of a request for payment to make full payment.

Within four months of the City's acquisition of their former properties, each petitioner applied for mandatory release of the City's interest (5a, 73a; Exh. L, p. 34). Neither, however, paid the arrears on their former properties; instead, each petitioner changed its application for mandatory release to an application to the Board of Estimate for discretionary release (76a; Exh. L, p. 37). On August 16, 1979, the Board of Estimate voted to deny each petitioner's application for discretionary reconveyance (81a; Exh. L, p. 42).

(2)

By separate petitions, each verified by Mr. Goldman on September 20, 1979, each petitioner commenced proceedings pursuant to NY CPLR Article 78 seeking review and annulment of the

Board's denials (53a-60a; Exh. L, pp. 13-2).

Stratford's petition alleged that, while its application for mandatory reconveyance was pending, representatives of the City's Department of Real Estate advised Stratford that payment of its arrears was not an urgent matter, that there would be no problem in Stratford's reacquiring the subject property through a discretionary application. Stratford changed its application to a discretionary one. Also asserted by Stratford was that it had not been provided a copy of, nor the chance to refute, a report prepared by the Commissioner of General Services regarding its discretionary reconveyance application pending with the Board of Estimate. Stratford urged that the Real Estate Department's records showed that its former property had not been sold, condemned, assigned to a City agency, or otherwise disposed of. Finally, Stratford's petition alleged that its application for reconveyance was placed on the Board's calendar of August 16, 1979 as a result of a motion Stratford had made in court for an order requiring its application to be so

calendared (53a-60a). Based on the foregoing, Stratford's petition alleged, as a first cause of action, that the Board's denial of its application was, "improper and illegal in that it was arbitrary, capricious and constituted an abuse of discretion," and, as a second cause of, that the denial had violated the New York and United States Constitutions because it "constitutes the taxing [sic] of petitioner's property without due process of law" (58a). The relief requested was an order vacating the Board of Estimate's denial and requiring the Board to grant the discretionary reconveyance application (59a).

Petitioner Solil demanded the same relief based upon the same causes of action (Exh. L, pp. 13-20). Save for differences in dates, its factual allegations were substantially identical. However, Solil did not allege that its application for reconveyance was placed on the Board of Estimate's calendar as the result of its motion. Solil's petition also alleged that, pursuant to an agreement it had reached with the Department of Real Estate "in or

about June, 1979," for reconveyance of its former property, Solil tendered $500,000 on June 1, 1979 as partial payment of its arrears. The petition alleged further that the tender was refused "because the Real Estate Department could not guarantee that the City would release its interest in the aforesaid property" (Exh. L, p. 17).

The respondents in State court moved to dismiss the petitions (61a; Deft's Exh. L, pp. 21-43). The affidavits of Assistant Corporation Counsel David Dworetsky submitted in support of each cross-motion addressed the factual and legal issues raised in the petitions. Pursuant to Administrative Code SD17-28.0, the possibility of entering into installment agreements for payment of back taxes had been available to Solil and Stratford. Statutory authorization for such agreements extended only until January 31, 1979, but neither Solil nor Stratford took advantage of the possibility by making application (67a; Exh. L, p. 27). Particularly with respect to Solil's allegation of the June, 1979 agreement, the Dworetsky affidavit noted that by

that date, the Real Estate Department lacked authority to enter into agreements. Further, since Solil's right to mandatory reconveyance had expired, the Department could not have agreed and did not agree to release the City's interest in Solil's former property in return for payment of arrears (Exh. L, p. 29).

Further, the Dworetsky affidavits pointed out that the petitioners had no property rights left in these parcels after the judgment of foreclosure in the in rem proceeding had divested them (70a). They were not entitled to notice of the Board of Estimate hearing on their applications for discretionary reconveyance, but the date and calendar of such hearings are a matter of public record, and they had a right to testify (69a).

On January 21, 1980, the cross-motions to dismiss the petitions were granted by the Supreme Court, New York County (48a-50a; Exh. L, pp. 7-10). With respect to each case, the Court held, inter alia, that the "contention that the action of respondents constituted a taking of property without

due process of law is wholly without merit" (50a). Judgments dismissing the petitions were entered February 19, 1980 (46a-47a; Exh. L, pp. 5-6).

(3)

On appeal to the Appellate Division, First Department, the petitioners submitted virtually identical main briefs (Exhibits, B, M), and reply briefs (Exhibits D, O), raising due process and class exclusion points. Respondents' briefs to the Appellate Division controverted these arguments (Exhibits C, N). The Appellate Division affirmed without opinion the judgments rendered by the Supreme Court (Exhibits E, P) and subsequently denied petitioners' applications for leave to appeal to the New York Court of Appeals.

Petitioners then sought leave to appeal from the Court of Appeals. They filed separate motions and supporting affidavits, but relied on a single brief (Exhibits F, Q). They appended exhibits - a magazine article and minutes - thereby attempting to impute a conspiracy to realize a profit by selling the property at auction. Respondents opposed the grant

of permission to appeal (Exhibits G, R). Affidavits by Assistant Corporation Counsel Morris Einhorn asserted in pertinent part that "Any contention that, in acquiring tax delinquent parcels, the City may only 'get stuck' with unprofitable and abandoned parcels that will deplete its tax collections by necessitating continued maintenance for the occupants thereof, without any countervailing 'profit' from a saleable parcel, is a 'standard' that has never been legislatively prescribed since it would obviously defeat a locality's ability to collect taxes" (Exhibit G, p. 6; Exhibit R, p. 6). On September 17, 1981, the Court of Appeals denied each petitioner's application (Exhibits H, S).

By notices of motion dated March 12, 1982, petitioners applied to the Supreme Court, New York County to vacate the judgments entered in February, 1980, basing their requests upon the interests of justice and on the claim of newly discovered evidence (Exhibits I, T). The latter consisted of the same magazine article and minutes previously submitted to the Court of Appeals. The

respondents opposed the motions to vacate the judgments (Exhibits J, U). After consolidating the motions for purposes of disposition, and after addressing on the merits each issue raised by petitioners, the Supreme Court denied the motions in a decision and order dated June 30, 1982 and entered July 8, 1982 (85a-90a).

The present action, pursuant to 42 U.S.C. 1983 and 1985, was commenced in March, 1982, shortly after the motion to vacate the State court judgments was initiated. The complaint alleges no facts that were not presented at some stage of the State court litigations. Based on a recapitulation of these claimed facts, it alleges deprivation of due process and equal protection and a conspiracy, and that therefore New York City Administrative Code §D17-25.0, as applied, should be declared unconstitutional (11a-15a).

The respondents moved for summary judgment, based upon the preclusive effects of res judicata, collateral estoppel and 28 U.S.C. §§1341, 1738 (28a).

DECISIONS BELOW

(1)

Upon respondents' motion for summary judgment, the District Court noted that it had previously denied petitioner a preliminray injunction on the grounds that they could not meet the requisites and that furthermore they were barred by res judicata and collateral estoppel. Stratford v. Capalino, 82 Civ. 1610. The Court stated the facts and issues and declared, "Plaintiff's claims have no merit." The opinion continues: (93a-94a):

> "On appeal to the Appellate Division, First Department, plaintiffs raised the same issues, albeit couched in slightly different terms. There, they argued that the Board of Estimate's denial of petitioners' application for release of the City's interest in their property violated the United States Constitution because it constituted a taxing of petitioners' property without due process of law. The First Department found that denial of the application was not arbitrary and capricious and was not a taxing of plaintiffs' property without due process of law.
>
> Plaintiff also alleged that the Board of Estimate had formulated a policy excluding a class of

applicants from the right to obtain a release of the City's interest in their in rem foreclosure of the acquired property and that this willful "class exclusion" was obvious from the type of forms used for in rem foreclosures. See Defendants' Exhibit M at 31, fn. 15. This argument was similarly dismissed by the First Department.

In New York, principles of res judicata will apply "in any subsequent action involving the same cause of action not only as to those issues which were actually litigated but also as to any issues which might have been, but were not, litigated in the earlier action." Winters v. Lavine, 574 F.2d 46, 56 (2d Cir. 1978). Furthermore, under the transactional analysis approach, used in New York, all claims arising from the same transaction are precluded once a final judgment is rendered even if they are based upon different theories or seek a different remedy. O'Brien v. City of Syracuse, 54 NY2d 355, 445 NYS2d 687, 688 (1981). Plaintiffs' attempt to re-dominate their claims under the rubic of 'equal protection' and 'due process' is to no avail, as these issues concededly arise from the same transaction, involve the same proof and are premised on the same relief. Hence, defendants' motion for summary judgment is granted."

(2)

The Court of Appeals, Second Circuit, affirmed, stating (Appendix to Petition for Writ of Certiorari, p. 2a):

> "Plaintiff-appellants, Stratford Place Corp. and Solil Management Corp., appeal from an order of the United States District Court for the Southern District of New York (Carter, J.) granting summary judgment to defendant-appellees in appellants' civil rights action. Appellants contend that New York City's in rem tax foreclosure proceedings against appellant's property violated appellant's due process and equal protection rights. Appellants have extensively and unsuccessfully presented their claims regarding the tax foreclosure in New York state courts.
>
> The preclusive effect of state-court judgments on federal civil rights actions is to be determined by state law. Migra v. Warren City Sch. Dist. Bd. of Educ., 52 U.S.L.W. 4151, 4154 (January 24, 1984). 'Section 1983 . . . does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims.' Id. at 4154. The court below correctly held that New York law would bar

> further litigation of the claims which appellants now seek to raise. See, e.g., O'Brien v. City of Syracuse, 54 N.Y.2d 353 (1981)."

REASONS FOR DENYING THE WRIT

THE JUDGMENT OF THE STATE COURTS WAS PROPERLY GIVEN RES JUDICATA EFFECT BY THE FEDERAL COURT.

(1)

The petitioners, in their petitions for certiorari, do not question the rule of Migra v. Warren Cty. Sch. Dist. Bd. of Educ., ___ U.S. ___, 104 S. Ct. 892 (1984) that a judgment of a state court precludes relitigation in federal court of issues that were or could have been raised in the State forum. Nor do they dispute that under the New York State transactional analysis rule all claims arising from the same transaction are precluded by a final judgment, even if based on different theories or seeking diffferent remedies. O'Brien v. Syracuse, 54 NY2d 353, 155 NE 2d 1158 (1980). Rather, they assert that the constitutional issues they would raise could not be raised in a New York State CPLR Article 78 proceeding.

This is a spurious argument that presents no substantial question for review, as the New York Courts frequently consider constitutional questions in Article 78 proceedings. E.g.g., Matter of Board of Educ. v. Nyquist, 31 NY2d 468 293 NE 2d 819 (1973); Matter of Westchester Ref. Temple v. Brown, 22 NY2d 488, 239 NE 2d 891 (1968); Matter of Posner v. Rockefeller, 31 AD2d 352, 297 NYS 2d 867 (3rd Dept. 1969); Matter of Calzadilla v. Dooley, 29 AD2d 152, 286 NYS 2d 510 (4th Dept., 1968). An Article 78 proceeding is the proper vehicle to test whether a statute has been applied in an unconstitutional manner. Matter of Fulling v. Palumbo, 21 NY2d 30, 233 NE 2d 272 (1967); Matter of Solnick v. Whalen, 49 NY2d 224, 401 NE 2d 190 (1980). If the constitutional challenge in an Article 78 proceeding is directed against a statute and all necessary parties are before the Court, the New York State Supreme Court, pursuant to CPLR 103 subd. c, is required to consider it by treating the proceeding as an action for a declaratory judgment. Matter of Kovarsky v. Housing and Development,

31 NY2d 184, 192, 286 NE 2d 882 (1972); Matter of Concord Realty v. City of New York, 30 NY2d 308, 314, 284 NE 2d 148 (1972); see, Matter of First Nat. City Bank v. City of New York, 36 NY2d 87, 94, 324 NE 2d 861 (1975). An asserted violation of due process is available as a question for State review under the third paragraph of CPLR 7803: "... whether a determination was made in violation of lawful procedure [and] was affected by an error of law." Matter of Solnick v. Whalen, supra.

Federal courts have frequently recognized the preclusive effect of judgments concerning constitutional issues arising from Article 78 proceedings. Powell v. Ward, 643 F. 2d 924, 934 (2d Cir., 1981); Ellentuck v. Klein, 570 F. 2d 414, 422-5 (2d Cir., 1978); Halprin v. NYC Conciliation Bd., 521 F. Supp. 529 (S.D.N.Y., 1981), aff'd 661 F. 2d 909 (2d Cir., 1981).

In Ellentuck, supra, the Court stated (570 F.2d at 423):

> In Matter of Kovarsky v. Housing and Development Administration, supra, 31 N.Y. 2d 184, 335 N.Y.S.

> 2d 383, 286 N.E.2d 882 (1972), the New York Court of Appeals was faced with a constitutional challenge to the enactment under which the respondent agency had acted. The matter was before the court under Article 78 of the New York CPLR * * *. The New York Court of Appeals, while declaring that constitutional challenges should normally be brought by way of an action for a declaratory judgment, nonetheless proceeded to the merits, treating the proceeding as a declaratory judgment action under the power conferred by CPLR §103(c) (McKinney 1972). The Kovarsky principle represented the view of the New York Court of Appeals that a court "should not become involved in drawing fine lines of distinction in characterizing the form in which relief is sought," [citations omitted]. Thus, if the "necessary parties" were before the New York courts, jurisdiction existed under CPLR §103(c) to render a decision on the constitutional questions actually litigated.

Therefore, in the instant case, the New York State Supreme Court was fully within its jurisdiction and powers in the original Article 78 proceeding when it held (50a):

> Petitioner's contention that the action of the respondents

> constituted a taking of property without due process of law is wholly without merit.

Petitioners are less than frank when, in quoting from the New York Supreme Court memorandum decision, they omit this pertinent sentence (Petition, p. 5). It confirms that petitioners not only could but actually did raise constitutional issues in their Article 78 proceeding and that the State courts duly considered them.

After the Article 78 petition was dismissed, petitioners appealed to the Appellate Division arguing due process and class exclusion (Stratford Brief, Deft's Exh. B, pp. 28-34, 30-31; Solil Brief, Deft's Exh. M., pp. 23-24, 30-31). By charging "class exclusion," they plainly and squarely brought up equal protection as well as due process issues. See Fay v. New York, 332 U.S. 261, 284 (1947); Hoyt v. Florida, 368 U.S. 57, 59-60 (1961). The Appellate Division unanimously affirmed without opinion. Matter of Stratford Place Corp. v. Capalino, 81 AD2d 1047 (1st Dept., 1981). Next, the petitioners sought permission to appeal to the Court of Appeals.

The Court of Appeals denied permission to appeal. 55 NY2d 603 (1981).

Thus, regardless of how petitioners phrased their pleadings, they introduced the same evidence and raised the same issues at various stages of the state proceedings that they wish to relitigate in the federal courts. Res judicata and collateral estoppel preclude such a double bite at the judicial apple. Kremer v. Chemical Construction Corp., 456 U.S. 461 (1982); Allen v. McCurry, 449 U.S. 90 (1980); Montana v. United States, 440 U.S. 147 (1979); Helprin v. NYC Conciliation and Appeals Bd., 521 F. Supp. 529 (S.D.N.Y. 1981), aff'd 661 F.2d 909 (2d Cir., 1981). The crucial element is the factual predicate of the claims asserted. "For it is the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies." Expert Elect Inc. v. Lavine, 554 F. 2d 1227 (2d Cir., 1977).

(2)

Relitigation is barred by the rule of comity embodied in 28 U.S.C. §1738. Migra v. Warren Cty.

Sch. Dist., supra; Kremer v. Chemical Construction Corp., supra; Winters v. Levine, 574 F.2d 46, 54 (2d Cir., 1978). Moreover, in the area of tax law, Congress has specifically enacted a bar to litigation and relitigation in federal courts of local tax matters amenable to state remedy and process. Thus, 28 U.S.C. §1341 provides:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under state law where a plain, speedy and efficient remedy may be had in the courts of such state.

This act is a broad jurisdictional barrier. Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 470 (1970). It bars federal courts from granting not only injunctions but also declaratory judgments and money damages. California v. Grace Brethren Church, 457 U.S. 393 (1982); Fair Assessment in Real Estate Assoc. v. McNary, 454 U.S. 100, 113-116 (1981).

The statutory procedures which petitioner challenge are clearly part of New York's method of real estate tax collection. In Nelson v. New York

City, 352 U.S. 103 (1956), this Court, unanimously upheld the basic statute as constitutional in the face of a claim that it violated due process. More recently, this Court reasserted the doctrine that the principal of comity, fundamental to "our Federalism" bars Federal District Court cognizance of damage claims in state tax matters where a remedy is available in the state courts -- since any exercise of such jurisdiction would interfere with the basic function of tax collection essential to the very survival of state and local government. Fair Assessment in Real Estate Assoc. v. McNary, supra, 454 U.S. 100, 108.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED WITH COSTS.

Respectfully submitted,

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